92-837

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

RAFEL LOPEZ JR., *et al.*,

Appellants,

v.

HALE COUNTY, TEXAS, *et al.*,

Appellees.

On Appeal From The United States District Court
For The Northern District Of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the district court err in failing to enjoin elections for certain county commissioners held pursuant to voting changes to which the United States Attorney General had objected under Section 5 of the Voting Rights Act, 42 U.S.C. section 1973c?

2. Did the district court err in dismissing this case on the basis of the doctrine of laches which barred the plaintiff's action to enforce section 5 of the Voting Rights Act?

3. What relief should be ordered by this Court in a situation where the federal district court has improperly permitted elections to occur pursuant to voting changes to which the Attorney General has objected under Section 5?

PARTIES

The parties in the court below are as follows:

Plaintiff: Rafel Lopez, Jr.

Defendants: Hale County, Texas, Bill Hollars, County Judge, Nina Jo Morris, Homer Roberson, Henry Rieff and James Belk.

The plaintiff in the court below is the appellant in this Court. The defendants in the court below are appellees in this Court.

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No. _____

In The

Supreme Court of the United States

October Term, 1992

RAFEL LOPEZ JR., *et al.*,

Appellants,

v.

HALE COUNTY, TEXAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

JURISDICTIONAL STATEMENT

The appellant is a Mexican American United States citizen registered to vote in Hale County, Texas[1] and is the plaintiff in the court below. He appeals from an order of the three-judge court of the United States District Court for the Northern District of Texas dated September 1, 1992, refusing to enjoin the implementation of the county reapportionment found to be objectionable by the

[1] Hale County is located in West Texas and has a total population of 34,671. The county government is comprised of the county judge and four county commissioners; they are elected to four year staggered terms. Two of the commissioners are up for election in 1992, while the other two face elections in 1994.

United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, and for dismissing his complaint with prejudice.

The voting change at issue is the reapportionment of the county commissioner precincts in Hale County. Despite the fact that the United States Attorney General objected under Section 5 to those changes, a three-judge federal district court in the Northern District of Texas denied the applicant's request for an injunction against enforcement of those changes. The three-judge district court's actions contravened Section 5 in two ways:

First, in the September 1, 1992 order, the district court ruled that the defendants could proceed with their November 3, 1992 general election even though the Attorney General interposed an objection to the county commissioner reapportionment plan. (The three-judge court's September 1, 1992 Final Judgment and Memorandum opinion are reproduced at App. 1 & 3). Such a ruling is unprecedented, it is contrary to this Court's decisions holding that unprecleared election changes are unenforceable, and totally nullifies the purpose of Section 5. In effect, the district court equitably precleared the voting change thereby exceeding its jurisdiction.

Second, the district court ruled that the doctrine of laches was a bar to equitable relief in an action to enforce Section 5 of the Voting Rights Act. App. 10-11. Under the district courts ruling, defendant jurisdictions can conduct elections in violation of Section 5 and then use this fact as a defense to requested equitable relief. Courts have uniformly rejected the defense of laches in connection with Section 5 enforcement proceedings.

OPINION BELOW

The memorandum opinion of the three-judge district court dated September 1, 1992 is unpublished and is reproduced in the accompanying appendix. App. 3. The final judgment of the court was entered on September 1, 1992 and is reproduced at App. 1.

JURISDICTION

The district court's order denying the requested injunctive relief and judgment was entered on September 1, 1992. A notice of appeal from the September 1, 1992 order was filed on September 11, 1992 and is reproduced at App. 16. This Court has jurisdiction of this appeal from the denial of injunctive relief by a three-judge district court under 28 U.S.C. Section 1253 and 42 U.S.C. Section 1973c.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c; the text of this section is reproduced at App. 28.

STATEMENT OF THE CASE

The Unprecleared Voting Change

On September 23, 1991 Hale County, Texas, adopted a new reapportionment plan for the County Commissioner precincts and submitted the new reapportionment plan

for preclearance on October 30, 1991. On December 30, 1991 the Attorney General requested additional information and specifically informed the defendants that the reapportionment plan was "legally unenforceable" until precleared. App. 22-23.

On March 10, 1992, notwithstanding the clear proscription of the Voting Rights Act and the specific warning given by the Attorney General, Hale County conducted the party primary elections (general elections took place eight months later on November 3, 1992).

On April 10, 1992, after the primary election had been conducted but seven months before the general election, the Attorney General interposed an objection to the proposed reapportionment. App. 24. On April 23, 1992, the plaintiff filed this lawsuit seeking to set aside the primary election and to enjoin further use of the objected-to reapportionment plan.

On July 23, 1992 the three judge court conducted a hearing pursuant to the plaintiff's requested summary and injunctive relief. At the hearing, the parties submitted stipulations that made it clear that the only issue before the court was the issue of remedy. On September 1, 1992, the three judge court issued it's ruling; finding that since the lawsuit was filed after the primary elections had been conducted, the plaintiff was guilty of laches. App. 10-11. The district court denied all relief sought and dismissed the lawsuit with prejudice. App. 1. By doing so, the district court permitted the general elections to proceed under the objected-to reapportionment plan

thereby equitably preclearing a voting change. On September 30, 1992 this Court denied appellants request for a stay pending appeal. App. 18.

THE QUESTIONS ARE SUBSTANTIAL

Section 5 provides that any voting change in a covered jurisdiction such as the State of Texas may not be implemented until the jurisdiction obtains preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia stating that the change has no discriminatory purpose or effect. *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982).

Section 5 is part of the Congressional effort to stop what this Court called the "insidious and pervasive evil" of racial discrimination in voting that "had been perpetuated in certain parts of our country." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

> To prevent any future circumvention of constitutional policy, Congress adopted Section 5 which provides that whenever a designated State or political subdivision wishes to change its voting laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory. By freezing each covered jurisdiction's election procedures, Congress shifted the advantage of time and inertia from the perpetrators of the evil to its victims.

United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110, 121 (1978). Accordingly, failure to obtain preclearance of a voting change under Section 5

"renders the change unenforceable." *Hathorn*, 457 U.S. at 269.

These principles have been turned on their head by the district court's decision unfreezing the status quo and permitting implementation of changes to which the Attorney General has objected under Section 5 because of their potential for racial discrimination.[2]

The questions in this case relate to the duty of a federal district court to enforce Section 5 once a State attempts to implement voting changes to which the Attorney General has interposed an objection or requested a submission. While three other federal district courts in Texas have recently enjoined implementation of voting changes, and enforced Section 5 of the Voting Rights Act, the district court in Hale County rendered a decision that is in direct conflict with the opinions of these other courts.[3]

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[2] Although neither the three-judge court below nor this Court on review has the authority to second-guess the Attorney General's substantive determination, *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 645-646 (1977) this is exactly what the district court did. In page 9 of the district court opinion (App. 11) the court finds that ordering a new reapportionment plan for the 1992 elections will "do nothing to advance the interests of this plaintiff". In effect, the district court exceeded its jurisdiction by second-guessing the Attorney General's substantive objection.

[3] The decision of the court in Hale County is directly contrary to three other three judge courts in Castro, Cochran and Deaf Smith Counties in Texas, which all addressed the same issue as the court did in Hale County. In all three of these counties the lawsuits were filed after the March 10, 1992 primaries. The defendants asserted laches, but none of the courts

This portion of the jurisdictional statement will first discuss that the district court improperly permitted elections to proceed using an objected-to reapportionment plan. Second, it will discuss the district courts application of the doctrine of laches. By mis-applying the doctrine of laches, the district court vitiated the Voting Rights Act and disenfranchised minority voters. Finally, it will suggest some remedies.

I. THE DISTRICT COURT ERRED IN PERMITTING ELECTIONS TO GO FORWARD UNDER UNPRECLEARED VOTING CHANGES TO WHICH THE ATTORNEY GENERAL OBJECTED UNDER SECTION 5

The Voting Rights Act specifically provides that the voting change adopted by Hale County cannot be implemented until the jurisdiction obtains preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia stating that the change has no discriminatory purpose or effect. *See Hathorn*, 457 U.S. at 269. While the defendants in Hale County did not obtain preclearance from the Attorney General, the district court in rendering its decision offered no reason why the defendants could not obtain preclearance by seeking a declaratory judgment from the United States District Court in the District of

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found merit to that claim, and instead enjoined implementation of the changes. These decisions heighten the likelihood that the Hale County decision was incorrectly decided. Opinions from those courts are reproduced in the accompany appendix at App. 33, 38 and 42 respectively.

Columbia. Instead, the district court permitted the elections to proceed without requiring the defendants to secure preclearance for the voting change.

By permitting the elections to proceed, the district court exceeded its limited jurisdiction. A three-judge court is limited to determining "(i) whether a change [is] covered by section 5, (ii) if the change [is] covered, whether section 5's approval requirements were satisfied, and (iii) if the requirements [are] not satisfied, what remedy [is] appropriate." *City of Lockhart v. United States*, 460 U.S. 125, 129, 103 S. Ct. 998, 1001 n.3, (1983). The court does not consider the merits of a plaintiff's claim that the proposed changes are discriminatory. *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977). In this case the parties submitted stipulations that made it clear that the only issue before the court was the issue of remedy.[4] However, the court exceeded it's jurisdiction by allowing the elections to proceed, thereby equitably preclearing a voting change.

The questions in this case relate to the duty of a federal district court to enforce Section 5 once a State attempts to implement voting changes to which the Attorney General has interposed an objection. This Court has granted probable jurisdiction in similar cases and reversed district courts that have failed to adequately enforce section 5. *See, e.g., NAACP v. Hampton County*

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[4] The parties stipulated that an objection to the voting change had been interposed by the Attorney General and that the voting change was covered by Section 5 of the Voting Rights Act. It was also stipulated that the March 10, 1992 primary election was an election conducted pursuant to an unprecleared election change.

Election Commission, 470 U.S. 166 (1985); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Blanding v. DuBose*, 454 U.S. 393 (1982); *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978); *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977); *Connor v. Waller*, 421 U.S. 656 (1975). The errors in many of these cases are similar to the errors in the present case indicating the likelihood that the Court in this case will reverse the lower court.

This court and individual Justices have held that elections should not go forward pursuant to unprecleared voting changes and have granted injunctions to prevent such elections. *See, e.g., Lucas v. Townsend*, 486 U.S. 1301 (1988); *Canady v. Lumberton County Board of Education*, 454 U.S. 957 (1981); *Holt v. City of Richmond*, 406 U.S. 903 (1972). As Chief Justice Burger said in a concurring opinion (joined by Justice Blackmun and Rehnquist) supporting the injunction against an unprecleared change to at-large elections in *Holt*: "[T]he legal effect of the . . . objection by the Attorney General, when coupled with the absence of a declaratory judgment from the United States District Court, District of Columbia, is to preclude the city from holding an election on an at-large basis." 406 U.S. at 903, quoting the Amicus Memorandum of the United States.

This is in accord with the unambiguous statements of this Court to the effect that unprecleared changes are unenforceable. "No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object." *Board of Supervisors of Warren County, Mississippi* 429 U.S. at 645.

Unprecleared changes "are not now and will not be effective as laws until and unless precleared pursuant to Section 5." *Conner*, 421 U.S. at 656.

In *Hathorn*, the Mississippi state courts permitted implementation of a voting change that was not precleared under Section 5, and this Court reversed. "Under our analysis, the change in election procedure is subject to Section 5, and the Mississippi courts *may not further implement that change* until the parties comply with Section 5." *Hathorn*, 457 U.S. at 270 (emphasis added). The three-judge district court in the present case implemented unprecleared changes, and this court should reverse as it did in *Hathorn v. Lovorn*.

In *NAACP v. Hampton County Election Commission*, the Supreme Court ordered the following relief:

> [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval. . . . *[I]f approval is not forthcoming*, the results of the March, 1983 elections *should be set aside*.

470 U.S. at 182-183 (emphasis added). Preclearance had yet to be sought from the Attorney General in Hampton County because of a contention that the voting change was not covered by the Act. By contrast, in the present case, the Attorney General objected to the voting change and the district court permitted the election scheduled for November 3, 1992 to proceed. Thus the Attorney General's approval was not received, and pursuant to *Hampton County*, the March primary and the November election should be set aside.

II. THE DECISION OF THE DISTRICT COURT VITIATED THE VOTING RIGHTS ACT AND DISENFRANCHISED MINORITY VOTERS BY APPLYING THE DOCTRINE OF LACHES.

Insofar as applicant is aware, prior to the decision of the district court in this case, no court had ever held that the doctrine of laches was a bar to an action to enforce Section 5 of the Voting Rights Act.[5] The district court found that because the Section 5 lawsuit was filed after the primary election was conducted, the plaintiff was " . . . guilty of laches, and we give that factor substantial weight in our equitable balancing."[6] App. 11. Courts have uniformly rejected the defense of laches in connection with actions under Section 5 of the Voting Rights Act. *See Dotson v. City of Indianola*, 514 F. Supp. 397, 401 (N.D. Miss. 1981) (delay in bringing suit does not bar a voting

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[5] In applying the doctrine of laches, the district court states: "Here, the plaintiff brought the unprecleared status to the local jurisdiction's attention well *after* the election, and, unlike the situation in *Clark*, suit was not filed before the election." (App. 13-14) This holding creates a duty on the part of minority citizens to inform government jurisdictions, before any elections are conducted, of unprecleared election changes. This burden shifting is clearly against the whole purpose of Section 5 of the Voting Rights Act. *Berry v. Doles*, 438 U.S. 190, 194 (1978).

[6] In this case, the Attorney General did not object until after the primary elections had been conducted. Had the plaintiff filed the lawsuit before the primary elections, the defendants would have taken the position that the lawsuit was premature because no determination by the Attorney General had yet been made. To enjoin elections before a determination is made by the Attorney General would unnecessarily disrupt the election process given the prospect that the election change could be precleared after the election is conducted.

rights claim under Section 5 of the Act since a violation "arises anew each time the defendant enacts or seeks to administer an unprecleared voting regulation"), *aff'd* 456 U.S. 1002 (1982); *Henderson v. Graddick*, 641 F. Supp. 1192, 1200 (M.D.Ala. 1986) (equitable defense not available in Section 5 enforcement proceedings); *Haith v. Martin*, 618 F. Supp. 410, 414 (E.D.N.C. 1985) (the Voting Rights Act "does not give this court the power to provide equitable relief to defendants, no matter how just their cause"), *aff'd* 477 U.S. 901 (1986).

The doctrine of laches has been rejected as a defense because violations of voting rights are deemed continuing in nature, "suffered anew" each time a discriminatory election practice or procedure is used. *Smith v. Clinton*, 687 F. Supp. 1310, 1313 (E.D. Ark. 1988) aff'd mem. 109 S.Ct. 548 (1988). *Accord, Garza v. County of Los Angeles*, 918 F.2d. 763, 772 (9th Cir. 1990). ("Because of the ongoing nature of the violation, plaintiffs' present [§ 2] claim ought not be barred by laches"); *Jeffers v. Clinton*, 730 F. Supp. 196, 203 (E.D.Ark. 1989) (rejecting the defense of laches in a Section 2 case on the basis of "fairness and equal opportunity in voting") In this case, with the November 3, 1992 general election the plaintiff has "suffered anew" the injury of having to vote in a reapportionment plan that was in violation of federal law.

While the proximity of elections and delay in bringing suit might be taken into account in granting preliminary injunctive relief or in fashioning a remedy, e.g., *McNeil v. Springfield Park District*, 656 F. Supp. 1015 (C.D. Ill. 1987), *aff'd* on other grounds, 851 F.2d. 937 (7th Cir. 1988), they form no basis for the complete dismissal of petitioners' complaint. No jurisdiction has a right

grounded in equity to violate the Voting Rights Act. To create such a right, as did the district court, would transform a jurisdiction's failure to comply with Section 5 into a defense. Given the logic of the district court, the longer the jurisdiction failed to comply with Section 5 the stronger its equitable defense would become. Adopting such an argument would do precisely what the Act was designed to forbid: "allow the burden of litigation delay to operate in favor of the perpetrators and against the victims of possibly racially discriminatory practices." *Berry v. Doles*, 438 U.S. 190, 194 (1978) (Brennan, J., concurring).[7]

The application of the doctrine of laches to dismiss voting rights cases would subvert the enforcement scheme established by Congress and frustrate the remedial purposes of the Act. Congress enacted the Voting Rights Act of 1965 because of the failure of prior civil rights acts, i.e., the 1957, 1960 and 1964 Civil Right Acts, to remedy the problem of discrimination in voting in a prompt and decisive manner. *Katzenbach*, 383 U.S. at 313 ("[d]espite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination"). The weakness of the earlier laws was that they depended primarily upon case-by-case litigation for enforcement, and gave the advantages of delay and inertia to discrimination-prone jurisdictions. *Id.*, 383 U.S. at 328. In

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[7] In this case the defendants were aware before the primary election that the reapportionment plan was illegal. On December 30, 1991 the Justice Department told the defendants that the plan was "legally unenforceable." App. 22-23.

addition, once discriminatory laws were struck down by the courts, the affected jurisdictions often merely enacted new laws, equally discriminatory, to take their places, *Id.* at 314, 335. Responding to the "insidious and pervasive evil" of discrimination in voting, Congress enacted the stringent remedial provisions of the Voting Rights Act "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.* at 309, 328.

The use of laches to dismiss the complaint in this case, with the consequent reinstatement of a voting plan found by the Attorney General to be objectionable will provide a new avenue to be used by jurisdictions to implement discriminatory election procedures.

III. THE ELECTIONS THAT DID OCCUR PURSUANT TO UNPRECLEARED CHANGES SHOULD BE SET ASIDE, AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION OF ANY FURTHER RELIEF THAT MAY BE NECESSARY.

Because of the district court's erroneous holding regarding Section 5, it permitted the election and the winners to take office in certain county official positions even though the Attorney General objected under Section 5 to the method of electing those county officials.

The question now is what should be done about the elections the district court improperly permitted to occur. In *NAACP v. Hampton County Election Commission,* 470 U.S. 166 (1985), this Court ordered the following relief:

> [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to

> the Attorney General for approval. . . . If appellees *fail to seek this approval, or if approval is not forthcoming*, the results of the March, 1983 election *should be set aside.*

470 U.S. at 182-183 (emphasis added). In the present case, the defendants submitted the voting changes to the Attorney General for approval, and the Attorney General objected. Under the *Hampton County* rule, elections held pursuant to a voting change and objected to by the Attorney General should be set aside.

In addition to the above remedies, the district court can determine what further remedial measures are necessary in light of the rights of minority voters under Section 5. For example, the district court can consider in the first instance whether it is possible to hold new elections for the unprecleared seats under an interim court-ordered plan that cures the Section 5 deficiencies. *See Hathorn*, 457 U.S. at 270. Setting aside the results of the elections would not disrupt the present functioning of the Hale County government; the district court could still provide for the incumbents to hold over in office pending resolution of this case. *See Brooks v. Georgia State Board of Elections*, No. 288-146 (S.D. Ga.5/29/90) (three-judge court) (enjoining elections but permitting incumbents to remain in office during the pendency of preclearance efforts), *aff'd*, 111 S.Ct. 288 (1990).

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, probable jurisdiction should be noted and the district court opinion should be summarily reversed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

RAFEL LOPEZ, JR., Plaintiff,	)	
vs.	)	CA No. 5-92-CV-0078-C
HALE COUNTY, TEXAS, BILL HOLLARS, County Judge, NINA JO MORRIS, HOMER ROBERSON, HENRY RIEFF, and JAMES BELK, all in their official capacity as County Commissioners of HALE COUNTY, TEXAS, Defendants.	)	(Filed Sept. 1, 1992)

FINAL JUDGMENT

Before SMITH, Circuit Judge, WOODWARD and CUMMINGS, District Judges.

JERRY E. SMITH, Circuit Judge:

By memorandum opinion of even date herewith, this court has denied the motion for summary judgment filed by the plaintiff, Rafel Lopez, Jr., has denied the plaintiff's request for injunctive relief, and has dismissed the complaint. In accordance with FED. R. CIV. P. 58, judgment is hereby ENTERED in favor of defendant Hale County, Texas, and in favor of Bill Hollars, Nina Jo Morris, Homer Roberson, Henry Rieff, and James Belk in their official capacity as members of the Commissioners Court of Hale County, Texas, and against the plaintiff, Rafel Lopez, Jr. All relief is DENIED. The complaint is DISMISSED, said

dismissal being with prejudice in so far as it regards the 1992 primary and general elections. The defendants shall recover all costs of court from the plaintiff.

Entered this 1st day of September, 1992.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
United States District Judge

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

RAFEL LOPEZ, JR., Plaintiff,	)	
vs.	)	CA No. 5-92-CV-0078-C
HALE COUNTY, TEXAS, BILL HOLLARS, County Judge, NINA JO MORRIS, HOMER ROBERSON, HENRY RIEFF, and JAMES BELK, all in their official capacity as County Commissioners of HALE COUNTY, TEXAS, Defendants.	)	(Filed Sept. 1, 1992)

MEMORANDUM OPINION

Before SMITH, Circuit Judge, WOODWARD and CUMMINGS, District Judges.

JERRY E. SMITH, Circuit Judge:

In his complaint brought pursuant to section 5 of the Voting Rights Act of 1965 (the "Act"), 42 U.S.C. § 1973c, the plaintiff, an Hispanic registered voter of Hale County, Texas, seeks an order prohibiting the county and its Commissioners Court[1] from further implementation of voting changes effected without preclearance as required by the

[1] As in all Texas counties, the Commissioners Court is the governing body, performing both legislative and administrative functions. It consists of the county judge and four county commissioners. For convenience, we refer to the defendants collectively as the "county."

Act. In accordance with 28 U.S.C. § 2284, the present district court of three judges has been convened to consider whether the plaintiff is entitled to relief.

I.

The facts are undisputed. In 1991, following the decennial census, the Commissioners Court redrew the boundary lines for the four commissioners precincts. Because of various legal questions regarding whether the census figures would be adjusted, the reapportionment process was delayed. On September 11, 1991, the Commissions Court approved a final plan of reapportionment and, on October 23, 1991, submitted the plan to the Attorney General of the United States for preclearance.

Despite the county's request for expedited consideration, the Attorney General issued no definitive response until April 10, 1992, at which time he indicated his unwillingness to preclear the plan. By that time, the new reapportionment plan already had been implemented. For example, the candidate filing period had begun in December 1991, as required by state law, and voter registration certificates had been issued. The filing deadline, under state law, had occurred on January 2, 1992, for the primary elections to take place in the spring.

Most importantly, the general primary elections already had been held, as provided by the state election code, on March 10, 1992 – but only for two of the four

commissioners, precincts, precincts 1 and 3.[2] The parties are in agreement that the focus of the plaintiff's complaint regarding the new reapportionment plan is precinct 2, as to which, along with precinct 4, elections are not scheduled until 1994.

A month after the primary – on April 10, 1992 – the Attorney General interposed an objection, noting that under the plan that had been implemented, "Hispanics would not constitute a majority of the registered voters in either [precinct 1 or precinct 2] in the new plan" and that the problem could be remedied by "minimizing the proposed plan's fragmentation of the Hispanic population- . . . between [precincts] 1 and 2."

II.

The plaintiff did not file his complaint in this matter until April 23, 1992 – approximately two weeks after the Attorney General had objected and six weeks after the primary elections had occurred. The complaint avers that, as the election was conducted without preclearance, it is a nullity. The plaintiff prays that this court declare the voting change unenforceable and fashion an appropriate remedy.

After the county had answered,[3] the plaintiff moved for summary judgment, requesting that the November 3,

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[2] The results of the March 10, 1992, general primary in precincts 1 and 3 were such that no runoff elections were necessary.

[3] In its answer, the county argues that what it calls a "safe minority precinct" is impractical in Hale County:

1992, general election be enjoined until the county adopts a reapportionment plan that complies with section 5 and that the March 10 primary elections be declared void. The county responded, asking instead that the primary election results remain in place, that the general election proceed as scheduled, and that this court "[d]etermine the necessity for any modification of lines used for the primary elections of 1992 within the context of 1994 elections only, thereby preventing wholesale confusion and chaos among voters during 1992 elections." Importantly, the county also pled laches, contending that the plaintiff is barred from obtaining any equitable relief because he waited until after the primary election had occurred before filing the present action.

Although Defendants admit that the minority population of Hale County is significant, Defendants aver that this minority population is not so geographically compact as to allow for statistically proportionate minority representation upon the Commissioners court, or the creation of more statistically substantial minority precincts without the necessity of a bizarre precinct configuration which would not be conducive to prudent administration of elections, would deny efficient budget administration duties imposed upon Commissioners, would significantly interfere with or effectively eliminate traditional functions of the Commissioners Court regarding rural road maintenance, and would be injurious to the public interest by the creation of geographically disparate communities sharing little similar interest, leadership or contiguity. Reasonable alternative plans would not significantly increase the potential for minorities to elect a candidate of choice despite the imposition [of] all the stated negative aspects of such a narrow based [sic] plan.

The parties have entered the following stipulations:

1. That the Plaintiff, Rafel Lopez, is a Mexican American resident of Hale County, Texas. He has standing to bring this lawsuit.

2. That Hale County, Texas is a jurisdiction covered by Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973(c) [sic], and, therefore, cannot enforce voting changes unless they have been precleared by the United States Attorney General or the United States District Court for the District of Columbia.

3. That the Hale County, Texas reapportionment plan adopted by the Commissioners Court of Hale County, Texas on September 11, 1991, is a voting change requiring preclearance pursuant to the Voting Rights Act.

4. That the Department of Justice interposed an objection to the Hale County, Texas reapportionment plan on April 10, 1992.

5. That the March 10, 1992 primary election for Hale County, Texas, was an election conducted pursuant to an unprecleared election change.

6. Filed in the papers of this cause as "Agreed Interim Plan" is a new reapportionment plan that has been agreed to by the parties. The Agreement calls for the submission of the new reapportionment Plan to the United States Department of Justice for preclearance in accordance with federal law.

7. That the 1992 elections should not be set aside at this time.

These stipulations were entered prior to oral argument in this matter.

The plaintiff continues to assert that he is entitled to summary judgment. He views, as appropriate relief, either the voiding of the March 10 primary and the holding of a new primary using acceptable boundaries, or an order implementing such new boundaries for the November general election but using the results from the primary that has been held.

The county continues to argue that the plaintiff is entitled to no relief and that laches bars his entitlement to an injunction. The county points out that it would be unduly disruptive to conduct a new primary and that, in any event, the district at issue – precinct 2 – is not scheduled on the ballot until 1994. The county also contends that it would be unfair to implement boundaries in the general election that are different from those utilized in the primary.

As shown by the above-quoted stipulation, the parties, while adhering to their respective legal positions, have presented to us an agreed apportionment scheme. Essentially, that plan differs from the one used in the primary in that the stipulated plan has a higher percentage of hispanic voters in precinct 2, thus presumably increasing the chance that, in 1994, hispanic voters would have a greater assurance of being above to elect at least one commissioner of their choice. The parties now suggest, as an alternative, that this court direct that the stipulated plan be submitted to the Attorney General for preclearance and that, if that scheme is precleared, either (i) it be used to conduct a new primary or (ii) it be

implemented for the November 1992 general election (at which the winners of the March 10 primary would appear on the ballot). If the proposed plan is not precleared, the parties propose that his court order it into effect for 1992 only, as an interim plan (either with or without the holding of a new primary).

IV.

In the matter before the instant three-judge panel, the plaintiff requests relief only under section 5; no section 2 or other relief is asked for. Moreover, the jurisdiction of a section 5 court is limited to consideration of the following issues: "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *City of Lochart v. United States*, 460 U.S. 125, 129 n.3 (1983).

The parties are in agreement that the changes implemented for the March 1992 primary are covered by the Act and that preclearance was not obtained, as required by section 5, from either the Attorney General or the United States District Court for the District of Columbia. The only question remaining for us to resolve, therefore, is that of remedy.

For several reasons, we conclude that the plaintiff has not shown himself entitled to any relief. Any order that would satisfy the plaintiff would be equitable in nature, so we look to principles of fairness and equity in determining whether to interject this court into the state's election procedures.

The statute provides a mechanism for an appropriate party, such as the instant plaintiff, to obtain an order enjoining further use of an unprecleared plan. Relief is not automatic, however. The federal courts do not *sua sponte* enter injunctions proscribing election changes; instead, a party must file suit and demonstrate entitlement to favorable judicial intervention.

Laches logically, and fairly, plays a part in our decision as to whether this plaintiff has shown such an entitlement. We conclude that he has not. He has advanced no reason why he could not have filed suit before the primary had occurred. The Supreme Court has indicated that this is an important factor. In *Clark v. Roemer*, 111 S. Ct. 2096, 2101 (1991), it observed that the "[a]ppellants displayed no lack of diligence in challenging elections for the unprecleared seats." *Accord South Carolina v. United States*, 585 F. Supp. 418, 423 (D.D.C.) (three-judge court) (per curiam) (dilatory motions may preclude entitlement to injunctive relief when they are filed on the eve of primaries), *cert. dismissed*, 469 U.S. 875 (1984).

Here, the primary, once conducted on March 10, created expectation interests that cannot lightly be discounted. The overriding purpose of the Act is to facilitate citizens' right to participate in the electoral process. While the Act permits that process to be interrupted where requirements such as preclearance have not been met, we do not enthusiastically consider setting aside an election that has occurred, where the plaintiff easily could have sought, and presumably would have obtained, an injunction prior to that election. In fact, courts in this circuit have held that ordering new elections in the absence of preclearance is a "drastic remedy" that should

be imposed only when essential to enforce basic voting rights. *See United States v. Louisville Mun. Separate School Dist.*, 557 F. Supp. 1168, 1172 (N.D. Miss. 1983) (three-judge court) (per curiam) (citation omitted). *Accord Cook v. Luckett*, 735 F.2d 912, 922 (5th Cir. 1984) (elections not to be set aside absent "serious voting violations or aggravating factors" (quoting *Saxon v. Fielding*, 614 F.2d 78, 79 (5th Cir. 1980))).[4]

Accordingly, this plaintiff is guilty of laches, and we give that factor substantial weight in our equitable balancing. But laches is not the only factor that weighs against granting relief. The fact is that ordering new boundaries for the 1992 general election – with or without a new primary – will do nothing to advance the interests of this plaintiff as a minority litigant, as no elections are scheduled in precinct 2 for 1992. Any order from this court regarding the 1992 elections would affect only precincts 1 and 3. There is little, if any, reason to disrupt the orderly election processes for those election districts when the focus of any Act-related concerns is elsewhere.

The county has indicated its willingness to adopt changes in the boundaries to precinct 2 that will increase the percentage of hispanic voters in that district. Any

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[4] The plaintiff cites a number of cases in which courts have voided elections that already have occurred. In those cases, however, the section 5 suit was filed *before* the section, not, as here, approximately 1½ months later. E.g., *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166 (1985); *Clark v. Roemer*, 111 S. Ct. 376 (1990) (per curiam); *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark.) (three-judge court) (suit filed several weeks before primary), *aff'd mem.*, 488 U.S. 988 (1988).

such changes, of course, would and could affect only the next scheduled election for commissioner in that precinct, which is in 1994. Under state law, such changes would not need to be in place until the fall of 1993, in time for mailing of voter registration certificates and for effecting the candidate filing process in advance of the filing deadline and the 1994 primary election.

If the county fails to make changes that are acceptable to this or any other potential plaintiff, or if such changes are made but not precleared, there will be ample opportunity for such a person to obtain section 5 equitable relief. No particular interest is served by entering an injunction now.[5]

In fact, the public interest would be disserved. An election has been held; voters have cast their ballots; candidates have been nominated; the county has expended considerable money and effort in that process. It would be particularly onerous to void that process and start over, unless overriding equitable considerations required it.

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[5] In *Brooks v. State Board of Elections*, 775 F. Supp. 1470, 1481 (S.D. Ga. 1989) (three-judge court) (per curiam), *aff'd mem.*, 111 S. Ct. 288 (1990), the court noted that it could not " 'equitably preclear' any of the changes based on equity's rule of laches." Our decision today does not constitute "equitable preclearance," as we hold only that equitable relief is not called for at this time. Thus, while laches is a factor in our decision, a finding of laches is not tantamount to preclearance under the facts and current posture of this case.

It would be equally unfair to require the candidates nominated according to the boundaries used in the primary to run in new districts in the general election. The parties have indicated that the boundaries under their newly-presented stipulated plan are significantly different from those used in the primary. Such chaos benefits no one and, most importantly, hardly advances the interest of representative democracy.

The Supreme Court has recognized that we may consider such broad equitable considerations as "whether new elections are so imminent that special relief is inappropriate," *Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982), and that in fashioning equitable relief we are "faced with the problem of 'reconciling the requirements of the Constitution with the goals of state political policy,' " *Upham v. Seamon*, 456 U.S. 37, 44 (1982) (per curiam) (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)). The Court also has left open the possibility that a section 5 district court may allow an election to go forward under circumstances even less compelling than the instant one:

> We need not decide today whether there are cases in which a District Court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward. An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed.

Clark v. Roemer, 111 S. Ct. at 2102. Here, the plaintiff brought the unprecleared status to the local jurisdiction's attention well *after* the election, and, unlike the situation

in *Clark*, suit was not filed before the election. Under such circumstances, "the district court should adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions." *Id.* at 2105.

In summary, we conclude that there is no need for this court to alter the legal relationship of the parties. The plaintiff, by failing to act timely, has suffered an election to take place and expectations and interests to be created. There is ample opportunity for the county to make further changes and to have those changes precleared for the 1994 elections.[6] If that occurs – and we have entry reason to believe it will – the Supreme Court's directive in *Clark* that we "adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner," *id.*, will have been heeded.

Thus, there are no equitable reasons for this court to take action now that would be only counterproductive. Absent any action by this court, the November 3, 1992, general election in Hale County presumably will proceed as scheduled, using the county commissioner precinct districts that were in effect for the March 10, 1992, primary, and also using the results of that primary.[7]

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[6] As a § 5 court, we express absolutely no view as to whether the boundaries used in the March 10, 1992, primary are in violation of the Act or of the Constitution. *See City of Lockhart*, 460 U.S. at 129 n.3 (1983); *Perkins v. Matthews*, 400 U.S. 379, 385 (1971).

[7] There is no doubt that we have the authority, in the face of an unprecleared plan, to allow the election to proceed: "[E]lec-

The plaintiff's motion for summary judgment is DENIED. The request for injunctive relief is DENIED. The complaint is DISMISSED, the dismissal being with prejudice in so far as it regards the 1992 primary and general elections. A separate judgment, consistent with this memorandum opinion, will be entered contemporaneously herewith pursuant to FED. R. CIV. P. 58.

Entered this 1st day of September, 1992.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
United States District Judge

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

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tions may be held under exigent circumstances under a plan to which the Attorney General has objected." *Campos v. City of Houston*, No. 91-6100, 1992 U.S. App. LEXIS 17452, at *16 (5th Cir. July 31, 1992) (per curiam) (revised opinion) (citing *Clark*, 111 S. Ct. at 2102).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

RAFEL LOPEZ JR., Plaintiff, vs. HALE COUNTY, TEXAS, BILL HOLLARS County Judge, NINA JO MORRIS, HOMER ROBERSON, HENRY RIEFF and JAMES BELK, all in their official capacity as County Commssioners of HALE COUNTY TEXAS, Defendants,	§	C A No. 5-92-CV-0078-C (Filed Sept. 11, 1992)

PLAINTIFF'S NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT OF THE THREE JUDGE DECISION PURSUANT TO 42 USC 1973c

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Notice is hereby given that Plaintiff-Appellant Rafel Lopez hereby appeals to the United States Supreme Court the three judges decision and final judgment of September 1, 1992.

Respectfully submitted,

DATED: September 10, 1992

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512/222-2102
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By: /s/ Rolando L. Rios
ROLANDO L. RIOS
ATTORNEY FOR PLAINTIFF
State Bar No. 16935900

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Plaitniff's Notice of Appeal has been sent by certified mail to the opposing counsel on this 10th day of September, 1992, at the following location:

Mr. Bob Bass, Esq.
ALLISON & ASSOCIATES
Wahrenberger House
208 W. 14th Street
Austin, Texas 78701

/s/ Rolando L. Rios
ROLANDO L. RIOS
ATTORNEY FOR PLAINTIFF

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

September 30, 1992

Rolando L. Rios
Attorney at Law
115 E. Travis, Suite 1024
San Antonio, TX 78205

Re: Rafel Lopez, Jr. v. Hale County, Texas et al. Application No. A-242

Dear Mr. Rios:

The Court today entered the following order in the above-entitled case:

> "The application for an injunction and stay pending appeal presented to Justice Scalia and by him referred to the Court is denied."

Very truly yours,

WILLIAM K. SUTER, Clerk

By /s/ Francis J. Lorson
Chief Deputy Clerk

gj
cc: Bob Bass
Clerk, U.S. District Court for the Northern District of Texas (Your No. 5-92-CV-0078-C)

DEC 30 1991

Robert T. Bass, Esq.
Allison & Associates
208 West 14th Street
Austin, Texas 78701

Dear Mr. Bass:

This refers to the 1991 redistricting plans for the commissioners court and justice of the peace districts; the realignment of voting precincts; and the renumbering of voting precincts for Hale County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on October 30, 1991; supplemental information was received on December 19, 1991.

Our analysis indicates that the information sent is insufficient to enable us to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. A single map depicting both the proposed commissioners court district lines and the existing district lines, and the residence of each county commissioner and justice of the peace. Also provide a map showing the existing and proposed election precinct lines.

2. A detailed, chronological, step-by-step description of the process leading to the adoption of the proposed plans. Include a description of all meetings and discussions involving any commissioner, the county

judge, other county official, or the demographer regarding the relative merits and demerits of the proposed plans and all alternative or draft plans, including discussions other than at formal meetings. In particular, describe any discussions regarding the division of minority population concentrations in and around the city of Plainview, and whether an alternative configuration should be adopted which to a greater extent places those concentrations in two of the commissioner districts. Also describe any discussions with respect to whether the justice of the peace districts should be configured to combine, in one district, commissioner Districts 1 and 2, and all discussions with respect to whether the state constitution requires that the county include a greater number of justice of the peace districts.

3. Copies of all documents relating to the redistricting process, including transcripts, tape recordings, and any additional minutes of all meetings and hearings concerning redistricting; correspondence concerning redistricting sent by or addressed to any commissioner, the county judge, other county official, or the demographer; any additional newspaper articles, editorials, and letters to the editor concerning redistricting; and any additional redistricting studies, reports, or analyses.

4. A detailed description of the criteria for developing the proposed plans, including any instructions given to the demographer, and a detailed explanation of the reasons for the particular choices of boundary lines. In this regard, we understand that the criteria included a consideration of the number of road miles in each commissioners court district. Explain the relevance of this criterion to redistricting and provide any data available

during the redistricting process as to the number of road miles in each existing and proposed commissioners court district.

5. A detailed explanation of minority input regarding the development of the proposed plans, including the name and daytime telephone number of any minority person or organization commenting on the proposed changes, the substance of the comments or suggestions, the action taken by the county in response and, if any suggestions were rejected, the reasons for that action.

6. A copy of each alternative or draft redistricting plan that was devised, considered, or discussed, whether formally or informally, by the commissioners, the county judge, other county officials, or the demographer. Provide the 1990 Census population data, by race and Hispanic origin, and a map of each alternative or draft plan (indicate the residence of each incumbent commissioner and justice of the peace on each map). Describe the manner in which each alternative or draft originated, the circumstances in which it was presented to or considered by the commissioners court, and the reasons why each alternative was rejected or passed over. In addition, describe any redistricting approach considered by any commissioner, the county judge, other county officials, or the demographer that was not developed into a plan, the circumstances in which it was considered, and the reasons for not developing into a plan.

7. Election returns for statewide, legislative, judicial, county, and school board elections from 1980 to the present in which a minority candidate participated. For each election, indicate the position sought (indicate the

incumbents, if any, and whether incumbency was by election or appointment); the number of positions to be filled; each candidate's name and race, and those candidates of Hispanic origin; the number of votes each candidate received, by voting precinct (indicate winners and those who went to a runoff); and the number of registered voters, by race, Hispanic origin, and precinct, at the time of the election. If such registration data are unavailable, provide an estimate of the black and Hispanic percentages in each precinct at time of each election.

In addition, concerns have been raised that the proposed commissioners court plan fragments minority population concentrations in and around the City of Plainview among all four commissioner districts thereby minimizing the opportunity of minority voters to elect candidates of their choice in commissioner Districts 1 and 2. In addition, concerns also have been raised that the manner in which the commissioners court districts have been combined to form the justice of the peace districts minimizes minority electoral opportunity. We would appreciate any response you may have in this regard.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof places upon the submitting authority. See also 28 C.F.R. 51.40 and 51.52 (a) and (c). Changes in procedure which affect voting are legally unenforceable unless Section 5 preclearance has

been obtained. Therefore, please inform us of the action Hale County plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, please call Steven Light (202-514-6334) of our staff. Refer to File No. 91-4048 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By:

Gerald W. Jones
Chief, Voting Section

(seal)

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General
Washington D.C. 20530

APR 10 1992

Robert T. Bass, Esq.
Allison & Associates
208 West 14th Street
Austin, Texas 78701

Dear Mr. Bass:

This refers to the 1991 redistricting plan for the commissioners court, and the realignment and renumbering of voting precincts for Hale County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your responses to our request for additional information on February 10 and March 25, 1992; other supplemental information was received on March 6 and 30, 1992.

We have considered carefully the information you have provided, as well as information from other interested persons. As documented by the 1980 and 1990 Censuses, the Hispanic share of the county population rose substantially in the past decade, from 34 percent in 1980 to 42 percent in 1990. This increase similarly was reflected in the existing commissioners court districts. In particular, the Hispanic proportion in District 2 increased from a bare Hispanic majority of 54 percent to 67 percent,

giving Hispanic voters a significant opportunity to elect a candidate of their choice to the commissioners court.

The proposed plan reduces the Hispanic population percentage in District 2 by nine percentage points (to 58%) while it increases the Hispanic share of the population in District 1 from 42 to 57 percent. The registration data compiled by the State of Texas reveal that Hispanics would not constitute a majority of the registered voters in either district in the new plan. On the other hand, the data show that Hispanics are nearly a majority of the registered voters in existing District 2.

Our analysis indicates that the malapportionment in the existing commissioners court districts may be remedied with little or no reduction in the Hispanic percentage in District 2 and with no meaningful alteration to the districting configuration selected by the county. This may be accomplished principally by minimizing the proposed plan's fragmentation of the Hispanic population in Plainview between Districts 1 and 2. It also appears that such a plan would continue to provide Hispanic voters the opportunity to exert a substantial influence in District 1 elections. In light of the apparent pattern of polarized voting in local elections, the proposed plan would appear to "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). In addition, the county has failed to provide an adequate nonracial explanation for its redistricting decisions.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a

discriminatory effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the county's burden has been sustained in this instance with respect to the commissioners court redistricting plan. Therefore, on behalf of the Attorney General, I must object to this change.

Because of the realignment and renumbering of the voting precincts are directly related to the objected-to redistricting plan, the Attorney General will make no determination at this time with regard to these matters. 28 C.F.R. 51.22(b).

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the objected-to change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the proposed redistricting plan continues to be legally unenforceable. *Clark v. Roemer*, 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Act, please inform us of the action Hale County plans to take concerning this matter. If you have any questions,

you should call Mark A. Posner, an attorney in the Voting Section, at (202) 307-1388.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

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§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does

not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with

the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title I, § 5, Aug. 6, 1965, 79 Stat. 439, redesignated and amended Pub.L. 91-285, §§ 2, 5, June 22, 1970, 84 Stat. 314, 315; Pub.L. 94-73, Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 405.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

EMMA REYNA, PLAINTIFF, v. CASTRO COUNTY, TEXAS, DEFENDANT.	§ § § § § § § §	CIVIL ACTION CAUSE NUMBER 2:92-CV-168-J CONSOLIDATED WITH NUMBER 2:92-CV-202-J (Filed Oct. 14, 1992)

JUDGMENT OF THE THREE JUDGE COURT

The March 10, 1992 primary election for Castro County Commissioners' Precincts One and Three is hereby declared invalid. Castro County shall be and is hereby enjoined from conducting the November 3, 1992 general election to the extent this election implements the redistricting plan adopted by the County on September 9, 1991 or seeks to elect Castro County Commissioners in and for Castro County Commissioners' Precincts One and Three. All relief not herein granted is denied without prejudice.

It is SO ORDERED.

Signed this the 14th day of October, 1992.

/s/ William Garwood
by Mary Lou Robinson
WILLIAM GARWOOD
UNITED STATES CIRCUIT
JUDGE

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES DISTRICT
JUDGE

/s/ Eldon B. Mahon
by Mary Lou Robinson
ELDON B. MAHON
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

EMMA REYNA, PLAINTIFF,	§	CIVIL ACTION CAUSE NUMBER 2:92-CV-0168-J
v.	§	CONSOLIDATED WITH NUMBER 2:92-CV-0202-J
CASTRO COUNTY, TEXAS,	§	(Filed Oct. 14, 1992)
DEFENDANT.	§	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF THE THREE-JUDGE COURT

The Three-Judge Court having conducted an evidentiary hearing on all pending matters in the above-styled cases, the following findings of fact, conclusions of law and order are entered. These findings and conclusions are based on the exhibits admitted at hearing, the testimony of the witnesses, and the pleadings on file in this case.

Findings of Fact

1. Plaintiffs Emma Reyna and Joe Crespin are individual United States citizens of Mexican descent, residents of Castro County, Texas, and are eligible to vote in elections for Castro County commissioners.

2. Defendant Castro County, Texas (Castro County) is duly and lawfully organized pursuant to the Constitution and laws of the State of Texas.

3. Castro County is a jurisdiction covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

4. As a result of changes revealed by the 1990 census, the Commissioners Court of Castro County on September 9, 1991 adopted a reapportionment and redistricting plan which enacted new and different practices and procedures with respect to the voting districts for county commissioners (the 1991 plan).

5. On October 7, 1991, Castro County submitted this 1991 redistricting plan to the United States Attorney General for preclearance as required by Section 5 of the Voting Rights Act.

6. Castro County held primary elections on March 10, 1992 under this 1991 redistricting plan prior to obtaining the required preclearance from the United States Attorney General.

7. The United States Attorney General objected to Castro County's 1991 redistricting plan on March 30, 1992; Castro County's April 30, 1992 request for reconsideration of this rejection was refused by the Attorney General on July 16, 1992.

8. On September 2, 1992, Castro County submitted a second redistricting plan to the Attorney General for preclearance under Section 5 of the Voting Rights Act (the 1992 plan).

9. By letter dated October 6, 1992, the Attorney General objected to Castro County's 1992 redistricting plan.

10. Castro County has not filed an action against the United States of America in the district court for the District of Columbia seeking a declaratory judgment that

one or more of these redistricting plans do not violate the Voting Rights Act.

11. Pursuant to the Texas Election Code, elections for the Commissioner's Office of Precincts One and Three of Castro County are scheduled to be held on November 3, 1992.

12. Any finding of fact constituting in whole or in part a conclusion of law shall be deemed a conclusion of law.

Conclusions of Law

1. Plaintiffs have standing to bring this enforcement proceeding pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq. Allen v. State Board of Elections*, 393 U.S. 544, 560, 89 S.Ct. 817, 829, 22 L.Ed.2d 1 (1969); *Bond v. White*, 508 F.2d 1397, 1398-99 (5th Cir. 1975).

2. This Court has jurisdiction over this enforcement action. 28 U.S.C. §§ 1343(a)(4) *and* 2284; 42 U.S.C § 1973c.

3. The jurisdiction of this Court is limited to a determination of whether a voting change is covered by Section 5, whether the preclearance requirements of the Voting Rights Act have been met, and, if they have not, to determine what remedy is appropriate under the circumstances of this case. *Clark v. Roemer*, ___ U.S. ___, 111 S.Ct. 2096, 2101-02, 114 L.Ed.2d 691 (1991); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645, 97 S.Ct. 833, 834, 51 L.Ed.2d 106 (1977).

4. Castro County's 1991 reapportionment of county commissioners' precincts is a voting change covered by Section 5 of the Voting Rights Act. 42 U.S.C. § 1973c.

5. The action of Castro County in implementing its 1991 reapportionment plan without preclearance by the United States Attorney General violated Section 5 of the Voting Rights Act, 42 U.S.C § 1973c. *Clark v. Roemer*, ___ U.S. ___, 111 S.Ct. 2096, 2101, 114 L.Ed.2d 691 (1991).

6. Castro County will be enjoined from implementing the 1991 plan's changes by conducting the November 3, 1992 general election to the extent this election implements changes in voting procedures by electing new Castro County Commissioners for Precincts One and Three.

7. Any conclusion of law constituting in whole or in part a finding of fact shall be deemed a finding of fact.

Final Conclusions

Castro County, Texas has violated Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The changes implemented by the 1991 redistricting plan are rendered unenforceable by this violation. Because the 1992 plan has been objected to by the United States Attorney General, Defendant's request that this Court order adoption of the redistricting changes proposed in this plan for the November, 1992 general election is denied. The judgment of the Court will be entered in accordance with these findings of fact and conclusions of law.

It is SO ORDERED.

Signed this the 14th day of October, 1992.

/s/ William Garwood
by Mary Lou Robinson
WILLIAM GARWOOD
UNITED STATES CIRCUIT
JUDGE

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES DISTRICT
JUDGE

/s/ Eldon B. Mahon
by Mary Lou Robinson
ELDON B. MAHON
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

OLIVIA CASARES, Plaintiff, v. COCHRAN COUNTY, TEXAS; ROBERT YEARY, County Judge; BILLY D. CARTER; FRANK DAVIDSON; A. W. COFFMAN; and KENNETH BURKE, all in their official capacities as County Commissioners of Cochran County, Texas, Defendants.	Civil Action No. 5:92-CV-184-C (Filed Oct. 9, 1992)

THREE-JUDGE COURT ORDER

Came on to be heard on September 29, 1992, the Plaintiff's Motion for Summary Judgment and Injunctive Relief and the Defendants' Motion for Judgment on the Pleadings. The Court finds that there are no genuine issues of material fact. Based on the uncontroverted evidence presented at the hearing, the pleadings and oral argument, the Court hereby enters the following findings:

1. This is an enforcement proceeding pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c).

2. Jurisdiction of this court is limited to determining whether a voting change is covered by Section 5, whether the preclearance requirements have been met, and, if they have not, what remedy is appropriate. *United States v.*

Board of Supervisors, 429 U.S. 642, 645, 97 S. Ct. 833, 834 (1977).

3. The Cochran County 1991 reapportionment of county commissioner precincts is a voting change covered by Section 5 of the Voting Rights Act.

4. Cochran County held primary elections on March 10, 1992, without obtaining preclearance from the United States Attorney General.

5. On April 6, 1992, the United States Attorney General filed an objection to the 1991 Cochran County reapportionment plan.

Based on the above findings, the Court hereby enters the following orders:

1. The Plaintiff's Motion for Summary Judgment and Injunctive Relief is granted as shown hereinbelow. The Defendants' Motion for Judgment on the Pleadings is denied.

2. Assuming, without deciding, that there are cases in which a district court may deny a Section 5 plaintiff's motion for injunction and allow an election using an unprecleared apportionment plan to go forward, there has been no showing by the defendants in this case of facts that, in equity, would justify allowing the November 3, 1992 general election for the election of county commissioners to proceed. At oral argument on this motion, counsel for the defendants volunteered that he was directly responsible for the timing of this lawsuit. Under this and other important circumstances reflected in the record, there is simply no reason in equity why the Voting

Rights Act should not be enforced as written. Accordingly, because of the objection interposed by the Attorney General, the Defendants are enjoined from using the objected-to reapportionment plan in the November 3, 1992 general elections for the election of county commissioners. *Clark v. Roemer*, 111 S. Ct. 2096, 2101 (1991). All other elections are not affected by this order.

3. Since ballots have already been printed, the Defendants are not required to reprint the ballots; the election results for county commissioner races shall not be certified. The effect of this order is that the incumbent county commissioners remain in office until valid elections are held.

4. The court hereby orders the Defendants to proceed as promptly as possible with preclearance of the reapportionment plan which has recently been submitted to the Attorney General, with whatever changes may be required to obtain preclearance, all as required by Section 5 of the Voting Rights Act. *McDaniel v. Sanchez*, 452 U.S. 130, 138, 101 S. Ct. 2224, 2230 (1981). Once precleared, the parties shall advise the Court as to what further relief may be necessary.

5. The parties are ordered to file a status report on this case by November 15, 1992.

SIGNED AND ENTERED this 9th day of October, 1992.

/s/ Carolyn D. King
UNITED STATES CIRCUIT JUDGE

/s/ Sidney A. Fitzwater
UNITED STATES DISTRICT
JUDGE

/s/ Sam R. Cummings
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

TRINI GAMEZ, Plaintiff, v. DEAF SMITH COUNTY, TEXAS; County Judge TOM SIMONS; JOHN STRIBLING, JR., LUPE CHAVEZ, TROY DON MOORE, and JOHNNY LATHAM, All in Their Official Capacities as County Commissioners of DEAF SMITH COUNTY, TEXAS, Defendants.	§ § § § § § § § § § § § § §	CIVIL ACTION NO. 2:92-CV-0115-J (Filed July 16, 1992)

ORDER

There is before this three-judge court Plaintiff's Motion for Summary Judgment and for Injunctive Relief. The parties have filed stipulations and a proposed new Reapportionment Plan and new Election Schedule. Based on the pleadings, stipulations, and agreement filed by the parties, the Court hereby enters the following FINDINGS and ORDERS:

1. This is an enforcement proceeding pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c).

2. Jurisdiction of this Court is limited to determining whether a voting change is covered by Section 5, whether the preclearance requirements have been met and, if they have not, what remedy is appropriate. *United*

States v. Board of Supervisors, 429 U.S. 642, 645, 97 S. Ct. 833, 834 (1977).

3. The Deaf Smith County 1991 reapportionment of county commissioners precincts is a voting change covered by Section 5 of the Voting Rights Act.

4. The United States Attorney General filed an objection to the 1991 Deaf Smith County Reapportionment Plan on April 10, 1992.

5. Because of the objection interposed by the Attorney General, the 1991 Reapportionment Plan, as it pertains to Commissioners Precinct 1, is hereby DECLARED illegal and the March 10, 1992 primary election conducted pursuant to the 1991 Reapportionment Plan for County Commissioner Precinct 1 is hereby set aside. *See Clark v. Roemer*, 111 S. Ct. 2096, 2101 (1991). All other elections in Deaf Smith County conducted on March 10, 1992 are not affected by this Order.

6. The parties have proposed a new Reapportionment Plan and a new 1992 Election Schedule for Deaf Smith County Commissioner Precinct 1 (attached as Exhibit A to this Order); the new Reapportionment Plan addresses the objections raised by the Attorney General in his letter dated April 10, 1992 (attached as Exhibit B to this Order). The Court hereby ORDERS that the new Reapportionment Plan and Election Schedule be immediately submitted to the Attorney General for preclearance as required by Section 5 of the Voting Rights Act. *See McDaniel v. Sanchez*, 452 U.S. 130, 138, 101 S. Ct. 2224, 2230 (1981).

7. The Court further ORDERS that should the preclearance procedure not be completed by the time of the election, the proposed Election Schedule and new Reapportionment Plan is ORDERED into effect as an interim plan to be used in the 1992 elections only. *See Connor v. Johnson*, 402 U.S. 690 (1971).

8. Should further relief be necessary, the parties are free to make the appropriate requests.

SIGNED AND ENTERED this 16th day of July, 1992.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
United States District Judge

/s/ Samuel R. Cummings
SAMUEL R. CUMMINGS
United States District Judge

/s/ Sam D. Johnson
SAM D. JOHNSON
United States Circuit Judge

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No. 92-837

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

RAFEL LOPEZ, JR.,

Appellant,

vs.

HALE COUNTY, TEXAS; et al.,

Appellees,

On Appeal From The United States District Court For The Northern District Of Texas

---

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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DECEMBER, 1992

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REASONS FOR AFFIRMING THE JUDGMENT BELOW

A. THE THREE JUDGE DISTRICT COURT PROPERLY EXERCISED ITS JURISDICTION AND DISCRETION TO FASHION AN APPROPRIATE REMEDY UNDER EXIGENT CIRCUMSTANCES.

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B. NO IRREPARABLE HARM WILL RESULT BY AFFIRMANCE OF THE COURT BELOW, APPELLANT BEING UNABLE TO SHOW THAT THE RELIEF SOUGHT VINDICATES, ESTABLISHES OR PROTECTS IMPORTANT VOTING RIGHTS.

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No. 92-837

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

RAFEL LOPEZ, JR.,

Appellant,

vs.

HALE COUNTY, TEXAS; et al.,

Appellees,

On Appeal From The United States District Court For The Northern District Of Texas

---

APPELLEE'S MOTION TO DISMISS OR AFFIRM

INTRODUCTION

Hale County, Texas, by and through its Commissioners Court (Appellees) move to dismiss this appeal, or, in the alternative, to affirm the judgment of the United States District Court for the Northern District of Texas in this case. Supp. Ct.

R. 18.6. The reasons for dismissal of affirmance appear below.

Appellant greatly exaggerates the implications of the Three Judge District Court ruling. Section 5 courts have admittedly narrow jurisdiction, but when a Three Judge District Court is required to fashion an appropriate remedy, its judicial authority is certainly sufficient to vest the Order entered by the Three Judge District Court for the Northern District of Texas Order on September 1, 1992, with validity under the exigent circumstances which exist in the specific facts of this case. Denial of Appellant's pleadings will not work a fundamental change to the body of Voting Rights law, as alleged, but would instead place the opinion of the Northern District of Texas in line with earlier precedent which grants a Three Judge District Court ample authority to fashion a proper remedy in a Section 5 case. If Appellant's requested relief is granted, the Supreme Court would unduly and unnecessarily limit the authority of Section 5 Courts.

STATEMENT OF THE CASE

Appellees, acting in conformity with affirmative duties imposed by the Constitution and

Statutes of the United States, and of the State of Texas, engaged in an orderly process of reapportionment of Commissioners Court precincts and related election precincts, beginning in late 1990, and culminating with the adoption of a plan for the reapportionment of County Commissioners Precincts on September 11, 1991. This plan was formally submitted to the Department of Justice pursuant to 42 U.S.C. 1973c on October 23, 1991. The Commissioners Court requested expedited consideration of the submission, citing state deadlines regarding candidate qualification and voter certification, which commenced as early as December 3, 1991. Appellees' request for expedited consideration was ignored by the Department of Justice. Appellees submitted all materials required by Department of Justice regulations (28 CFR 51.27), but on the last available day of the 60 day review period, (December 30, 1991) the Department of Justice requested voluminous additional information. The request for additional information came 27 days after the date required by State law for the opening of the candidate filing period, (Article 172.023 Texas Election Code) and 24 days after State law requires the voter registrar in each county to issue voter certificates identifying the election precinct in which each voter is eligible to

cast his or her ballot. (Articles 13.142 and 14.01 Texas Election Code.) Of course, before the voter registrar can determine the election precinct in which each registered voter is eligible to vote, the political boundaries of the county must be known and finally approved, in turn necessitating a pre-cleared plan prior to the statutory implementation dates.

The Appellees's response to the Department of Justice request for additional information again contained a renewed request for expedited attention prior to February 19, 1992, the date early voting begins under State law. (Article 85.01, Texas Election Code.) Despite Appellees's repeated requests for expedited attention, the Department of Justice used the full extent of the second 60 day preclearance review period, and did not pose an objection to the Hale County plan until April 10, 1992, a full month after the March 10 primary elections. Litigation was instituted April 23, 1992, more than six weeks after the primary election.

Within the void created by the lack of preclearance prior to the March 10, 1992 primary, the Commissioners Court of Hale County, Texas, (acting in reliance upon advisory directives from the Texas Secretary of State and legal opinion of counsel indicated by the attached Appendix A,

incorporated herein by reference), determined that the primary elections should proceed under the proposed reapportionment plan, rather than the existing plan for county elections, in the belief that the previously existing plan was unconstitutional under the 14th Amendment, and in the good faith belief that the proposed plan would ultimately obtain preclearance. Upon receipt of the letter interposing objections to preclearance from the Department of Justice on April 10, 1992, Hale County requested, by way of a Freedom of Information Act Request, information upon which it might further evaluate the Department of Justice objection. This information was not received until July 14, 1992, further frustrating Appellees opportunity to evaluate its position relative to the objection posed by the Department of Justice in a timely manner.

On May 1, 1992, Appellees requested reconsideration of the March 30, 1992 objection by the Department of Justice. This request for reconsideration was not acted upon or rejected until July 8, 1992. On July 15, 1992, the parties agreed to a new reapportionment plan which would address the objection raised by the Department of Justice, and which satisfied Appellant that minority interests would be well served. (See Appendix B, attached hereto and incorporated herein by reference.) In

this regard, Appellant stipulated "That the 1992 elections should not be set aside at this time."

On July 23, 1992, the Three Judge District Court conducted a hearing pursuant to Appellant's Motion for Summary Judgment. The only issue before the Court, as agreed by the parties, was the issue an appropriate remedy. (See page 4, paragraph 4, Appellant's Jurisdictional Statement. Appellant now chooses to emphasize the lower court's adverse ruling on laches, but ignores the fact that an appropriate remedy was indeed fashioned by the three judge district court, i.e. approving use of the objected to plan for 1992 elections, and utilization of the agreed new reapportionment plan for 1994 and beyond.) On August 21, 1992, the new reapportionment plan was submitted to the Department of Justice in an effort to obtain preclearance of the plan. Preclearance was granted October 21, 1992. (Appendix C, attached hereto and incorporated herein by reference.)

On September 1, 1992, the three judge district court issued it's Order and Memorandum Opinion. Appellant seeks to reverse the Three Judge Court, and to obtain new elections in Commissioners Precincts 1 and 3 in special elections to be held, presumably, in 1993.

REASONS FOR DISMISSING THE APPEAL

THE APPEAL IS NOW MOOT, THE AGREED PLAN HAVING BEEN PRECLEARED IN ACCORDANCE WITH THE VOTING RIGHTS ACT FOR USE IN 1994.

Article III of the United States Constitution limits federal courts to the adjudication of actual controversies between litigants. Deakins v. Monaghan, 484 U.S. 193, 199 (1988). The mere presence of a disagreement, however sharp, is insufficient by itself to meet this constitutional requirement. Diamond v. Charles, 476 U.S. 54, 62 (1986). Mootness is part of the concept of justiciability, for the reason that federal courts are not empowered to decide questions that cannot affect the rights of litigants before them. DeFunis v. Odegaard, 417 U.S. 312, 316 (1974), (citing North Carolina v. Rice, 404 U.S. 244, 246 (1971). Because mootness destroys jurisdiction, the loss of jurisdiction during an appeal will result in dismissal. Tiverton Board of License Commissioners v. Pastore, 469 U.S. 238, 239 (1985). Thus, when the relief sought by a reversal would not change the status of the legal interests of the parties, no real

dispute exists, and the case is not justiciable. Flast v. Cohen, 392 U.S. 83, 95 (1968).

In the present case, the parties stipulated to an agreed plan for reapportionment of Hale County. This plan, at the time of the entry of the Judgment below, was pending preclearance. On October 21, 1992, the United States Department of Justice issued it's letter of preclearance. (Appendix B, attached hereto and incorporated herein by reference.)

Because the precleared plan creates a precinct with a majority of Hispanic population in Precinct 2, and reduces the percentage of Hispanic population in Precincts 1 and 3, the relief sought (vacating election results and ordering new elections in precinct 1 and 3) would not change the status of the legal interests claimed by Appellant. Watkins v. Mabus, 112 S.Ct. 412 (1991). Appellant does not identify any injury he will suffer if the relief sought is not granted. He does not claim, for example, that potential candidates who might have sought to qualify in the previously existing precincts 1 or 3 declined to do so because they knew that the apportionment plan used in the March and November elections lacked preclearance. NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 177 (1985), nor does Appellant claim that, as a Mexican-

American voter, his opportunity to be fairly represented would be improved by vacating elections and ordering new elections. Where the requested relief would not demonstrably benefit anyone and could result in prejudice to voters, candidates, and Appellees by overturning the results of an already conducted election, the Court should deny the appeal on grounds of mootness.

REASONS FOR AFFIRMING THE COURT BELOW

A. THE THREE JUDGE DISTRICT COURT PROPERLY EXERCISED ITS JURISDICTION AND DISCRETION TO FASHION AN APPROPRIATE REMEDY UNDER EXIGENT CIRCUMSTANCES.

Section 5 of the Voting Rights Act expressly reserves to the United States Department of Justice or the District Court for the District of Columbia exclusive authority to determine issues of "preclearance". Questions of enforcement by a three judge court are limited to:

1. Whether the jurisdiction is covered by Section 5;

2. whether the disputed state law is a "voting change";

3. whether preclearance has been obtained; and

4. if preclearance is required but has not been obtained, what is the appropriate remedy.

See McLain v. Lybrand, 465 U.S. 236 at 250, n. 17 (1984). There should be little doubt that the grant of authority to a Section 5 Three Judge District Court to fashion an "appropriate remedy" is vast, both in terms of express judicial authority, and in the broader area of equity. Appellant would ignore the great weight of case law to the contrary and seek to unduly and unnecessarily restrict the power of Section 5 Courts to fashion appropriate relief. Existing law vests the Three Judge District Court with ample jurisdiction to craft the appropriate relief necessary under the specific circumstances of a particular case. The breadth of precedent and the application of this judicial discretion is demonstrated by the following cases:

In United States v. Louisville Municipal Separate School District, 557 Fed. Supp. 1168 (N.D. Mississippi, 1983), a Three Judge District Court fashioned an appropriate remedy in a case involving

a run-off election scheme by making the relief "prospective" in nature, and held elections under a non-precleared plan effective rather than declare them void. "Voiding or even modifying past elections is a drastic remedy and should be applied only where absolutely necessary to vindicate, establish or protect important voting rights." In Louisville Municipal, supra, the Department of Justice was criticized for its failure to seek an injunction until just four days prior to the primary election, although it had notice of the objection four months prior to the disputed election. Additionally, the Court recognized that local officials had acted in good faith in their efforts to comply with court orders which placed them in jeopardy of violation of the Voting Rights Act. In the present case, the Department of Justice objection was not lodged until after the primary election despite repeated requests for expedited consideration by Appellees. Appellees reasonably believed that the initially proposed plan would receive preclearance, and began implementation of the uncleared plan only upon advice of Texas election administrators. (See Appendix A attached hereto).

In South Carolina v. United States, 585 Fed. Supp. 418 (District of Columbia, 1984), the State of

South Carolina adopted a plan for the reapportionment of its state senate. This plan was still pending preclearance when the candidate qualification period began. Holding that candidate qualification was "implementation" under the Voting Rights Act, the Court held that primary elections should be enjoined. "Eleventh hour" litigation to enjoin the election was only reluctantly sustained upon the basis that the state had been slow to promulgate a reapportionment plan. In contrast, the Appellees now before the Court moved forward with due diligence, but were prevented from obtaining a timely preclearance opinion by the lack of final census data and bureaucratic inertia, each beyond the control of Appellees.

In Terrazas v. Clements, 537 Fed. Supp. 514, (N.D. Texas, 1982), the Three Judge District Court recognized that under circumstances similar to those confronted by Appellees County in this litigation, the option of holding elections under existing boundaries was no longer tenable on constitutional grounds due to the large population disparities which had occurred during the intervening ten years. Faced with almost certain litigation and possible vacation of election results under the "old" lines in a 14th Amendment malaportionment claim or a Section 2 challenge, the

State of Texas sought judicial relief by approval of its uncleared "new" lines as "interim" boundaries. See Terrazas at page 524. The Terrazas opinion, supra, as does the South Carolina case, clearly identifies the limitations upon a Three Judge District Court in matters related to a determination of the merits or constitutionality of a plan which has not been precleared, but both cases indicate that in the area of "fashioning an appropriate remedy" the Three Judge District Court's discretion is very broad. (See Terrazas, page 526, n. 14).

In Georgia v. United States, 411 U.S. 526 (1973), the Supreme Court considered a direct appeal from a Three Judge District Court decision involving elections which were conducted without preclearance as a result of a stay Order. In that case, the Court held that it would be inequitable to require new elections. The Court allowed the submitting jurisdiction reasonable time to seek preclearance of the challenged plan or a different plan which would preclear. See also Berry v. Doles, 438 U.S. 190 (1978), where similar judicial restraint was exercised.

Three Judge District Courts, under adverse circumstances, should not be unnecessarily restricted in the exercise of judicial discretion. In Mahan v. Howell, 93 S.Ct. 979 (1973), the Supreme

Court held that the Three Judge District Court did not abuse its discretion by fashioning relief which under other circumstances might have been inappropriate (multi-member districts used by Three Judge District Court at variance with usual preference for single member districts.)

In Upham v. Seamon, 456 U.S. 37, at page 38 (1982), the Supreme Court emphasized that in fashioning a reapportionment plan, the courts should not preempt the legislative task nor intrude upon state policy any more than necessary. See White v. Weiser, 412 U.S. 783 at 794-795 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971).

In discussion of the various rules of judicial deference, the Supreme Court stated at page 43 of Upham, supra, that "We have never said that the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General." See also Cook v. Luckett, 735 F.2d 912 at 921, (5th Cir. 1984), where it is stated "our decisions reveal a strong reluctance to undertake the drastic, if not staggering remedy of voiding a local election ...elections will not be set aside absent serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct." In

State of S.C. v. United States, supra, the Court held that dilatory motions may preclude injunctive relief where they are filed on the eve of primaries. In Perkins v. Matthews, 91 S.Ct. 431 at 447 (1971), it is stated "We should not forget that while it is easy for judges to order new elections, it will be neither easy nor inexpensive...to comply with such an order."

The facts of this case squarely present the "extreme circumstances" mentioned to in Clark v. Roemer, 111 S.Ct. 2096 (1991), and alluded to in earlier cases such as NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985), where the federal courts have allowed the subject governmental unit an opportunity to fashion a cure to the alleged ills of a voting rights violation rather than imposing injunctive relief as the presumptive remedy. See Georgia v. United States, 93 S.Ct. 1702, 1711 (1973); and Perkins v. Matthews, 91 S.Ct. 431, 441 (1973)

In Clark v. Roemer, supra, the Section 5 portion of a Voting Rights case was heard on appeal from a Three Judge District Court decision. There, "extreme circumstances" were discussed which might permit a Court to allow a non-precleared election plan to go into effect as an interim plan. The Court directly held that dilatory pleadings may

give rise to a different form of relief "ex post" elections that would not be appropriate in an "ex ante" situation. To overturn elections is an extreme remedy that should be considered only under the most egregious of circumstances.

Under the facts detailed above, Hale County had no real choice but to implement the proposed reapportionment plan, in light of the unconstitutional infirmities of the existing plan which were "too great to be justified by any state interest." See Terrazas v. Clements, 537 F.Supp. 514, 524 (1982), citing Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973); Kilgarlin v. Hill, 386 U.S. 120, 87 S.Ct. 820, 17 L.ed 2d 771 (1967); and Reynolds v. Sims, 377 U.S.533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Had the County chosen to use their old, malaportioned lines, it faced the very substantial likelihood of an injunctive challenge by Appellant and postponement of the election, or later vacation of those election results under a 14th Amendment or Section 2 claim. A similar "no-win" situation confronted the City of Houston in Campos v. City of Houston, 776 F. Supp. 304 (S.D. Tex. 1991), stay denied, Campos v. City of Houston, 112 S.Ct. 354 (U.S. 1991) and vacated, Campos v. City of Houston, 960 F.2d 26 (5th Cir. Tex. 1992), reh'g,

en banc, denied, Campos v. City of Houston, 1992 U.S. App. LEXIS 13949, op. withdrawn, substituted op., Campos v. City of Houston, 1992 U.S. App. LEXIS 17452 (5th Cir. 1992; United States v. City of Houston, et al, No. 91-3076, 91-3117 (S.D. Tex, Opinion August 21, 1992). In Campos, supra, however, suit was filed before the contested election, so there was a judicial vehicle in place for prompt remedial action by the federal court. Here, Appellant did not bring suit until six weeks after the disputed primary election.

Appellant argues that his suit is in fact timely, since it was filed well in advance of the General election in November. In Texas, the primary in March is the nominating process for the general election in November. At least one Texas Three Judge District Court has held that primaries are inseparable from the general election.

> "In common and universal usage the words "primary elections," with respect to offices filled by election from diverse geographically defined single member districts, mean elections in which will be chosen the party nominees for the next general election in the same district as that in which the primary election takes place. And this is clearly the accepted meaning of

> the term in the law and long settled practice in Texas...to order a redistricting plan fixing the boundaries of the several single member districts for the primaries only, and not for the next general election at which the officials would actually be selected, would be the height of futility and purposelessness." -- Terrazas v. Slagle, et al, A-91-CA-426, Western District of Texas, August 21, 1992 Order, See Page 65a, at 82a, State Officials Supplement to Appellants Jurisdictional Statement, and Supplemental Appendix, No. 91-1546, Slagle v. Terrazas, an appeal to United States Supreme Court.

In Campos v. City of Houston, 1992 WL 180267 (5th Cir. 7/31/92), the Court of Appeals clarified an earlier opinion, and directly held that under exigent circumstances, elections may be held under a plan to which the Attorney General has lodged an objection.

> "To hold, as the plaintiffs urge, that the district court lacked jurisdiction to adopt, as only an interim measure, the plan to which the Attorney General had initially objected creates unacceptable tensions with the consistently

recognized discretion of the district court to formulate and authorize the implementation of interim election plans in voting rights cases. Such a holding is further objectional because, illogically, it would make jurisdiction depend upon the relief ultimately ordered by the Court. Courts cannot operate under such post hoc rules. Second, although whether and why the Attorney General has objected to a certain plan are very relevant factors for the Section 2 Court to consider, alone they cannot preclude the court from using that plan as an interim measure. The Attorney General's objection or lack thereof does not necessarily indicate that the plan is constitutional or unconstitutional: it simply means that the plan has not met the necessary procedural requirements. Under appropriate circumstances, even an unconstitutional plan may be implemented on an interim basis."

Following remand, the three judge district court for the Southern District of Texas rendered an opinion on August 21, 1992, wherein the three judge district court found that the argument that new elections are the "presumptive remedy" is in

error, and that reliance upon Clark v. Roemer, 111 S.Ct. 2096 (1991) for this proposition was misplaced. The latest Campos opinion further confirms that the relief imposed by the Three Judge District Court in the Hale County case is appropriate under the exigent circumstances presented.

In Clark v. Roemer, supra, Appellants sought injunctive relief prior to the election. In the present case, although the predicament facing the County was apparent prior to the March 10 primary, Appellants did not seek to enjoin the election, but allowed it to go forward. Appellants failed to heed the warning explicit in Roemer, supra, on page 2101 "Appellants displayed no lack of diligence in challenging elections for the unprecleared seats"... or again on page 2102 "An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed."

Had Appellants herein sought the relief requested prior to the election of March 10, 1992, there is little doubt under existing law that the federal Court would have enjoined the election. However, by failing to exercise due diligence, Appellant's requested relief would create havoc with

the electoral processes in Hale County, and if anything, further diminish minority electoral potentials. For this reason, Appellant's requested relief in the form of injunction and vacation of election results should be denied. Appellant failed to assert alleged infirmities in the election scheme while there was a realistic chance to prevent any alleged harm. This Court should not enjoin elections held in the good faith belief that the boundaries were in conformity with established standards of constitutional and statutory law simply to satisfy dilatory Appellants.

The Supreme Court has repeatedly affirmed that under some circumstances, an interim plan that did not measure up to legal requirements, even constitutional requirements, might be allowed to serve as an interim plan in the exigent circumstances created by necessity. Any new elections at this late date would subject not only the individual candidates and taxpayers to unwarranted expense, but would create true chaos with voters. Practically speaking, there is every reason to believe that voter turnout for a special election would be minimal, thereby raising high potentials for minimizing minority impact upon election boundaries specifically drafted to address minority interests. The Northern District of Texas Three

Judge District Court properly fashioned relief that allowed Hale County to use the same lines for the general election as used in the primary election, but required that new, precleared lines be used in 1994 elections.

Plaintiff seeks to support his arguments by reference to other decisions in cases with similar facts in which various Three Judge Courts in the panhandle of Texas reached a determination that injunctive relief was appropriate. (Appendix P. 31, 38 and 42, Appellant's Petition)

These cases can be distinguished. In the Deaf Smith County case, (Appellant's Appendix p. 42), the parties agreed to special elections, and the Court merely ratified that agreement. In Castro County, (Appellant's Appendix p. 31, 33), the two precincts subject to 1992 elections were also the precincts with the highest minority concentrations, thereby rendering questions of preclearance and implications of voting rights vindication more pronounced as compared to the situation in the Hale County judgment, which held that injunctive relief would not vindicate voting rights concerns in 1992. The Cochran County (Appellant's Appendix P. 38) case is the most similar to the facts of Hale County in that in both cases the minority precinct would not come on for election until 1994. The rationale

between the two decisions admittedly is difficult to draw, although the Court in Cochran County appeared to discount any laches argument by the fact that Respondent's attorney, in oral argument, implied that the litigation was welcome, since it provided a vehicle for resolution of a clouded legal situation. However, instead of standing for the proposition urged by Appellant, the three distinguished cases serve to emphasize the need for a wide range of judicial discretion which is, and should be retained, in the Section 5 Courts when fashioning an appropriate remedy. Neither the Hale County nor the Cochran County judgments can be dispositively stated as the correct rule, but both can be equally supported as an appropriate remedy under similar facts within the sound discretion of the Section 5 Three Judge Court. Section 5 Courts should not be further limited in their ability to fashion appropriate relief as urged by Appellant. Only in situations which are clearly erroneous should a Three Judge Court judgment be set aside.

B. NO IRREPARABLE HARM WILL RESULT BY AFFIRMANCE OF THE COURT BELOW, APPELLANT BEING UNABLE TO SHOW THAT THE RELIEF SOUGHT VINDICATES, ESTABLISHES OR PROTECTS IMPORTANT VOTING RIGHTS.

Under Texas law, the 1992 elections nominate and elect a candidate to Commissioners Precincts 1 and 3, with Commissioners Precincts 2 and 4 being filled in the 1994 elections.

Despite the lack of preclearance, the 1992 primary election in Hale County nonetheless was more favorable to minorities than the existing, malaportioned boundaries in effect prior to the disputed reapportionment. Had Appellees strictly obeyed the mandate of the Voting Rights Act that no voting change be implemented until precleared, it would have been forced to proceed with elections under the "old" malaportioned boundaries which not only violated the 14th Amendments prohibitions against "one-person-one-vote" denials, but also did not provide minorities in Precinct 1 with an opportunity to elect a representative of choice. The "old" boundaries resulted in a precinct which was malaportioned (7.97% above the ideal precinct size) and which was composed of 54.36% Anglo voters.

Under the "old" boundaries, Precinct No. 2, which is not subject to elections until 1994, provided a combined minority population of 75.36%, although Precinct 2 was badly malaportioned (-12.36% below the ideal precinct size). Attached hereto as Appendix D is a demographic assessment of the boundaries in use prior to the 1991 reapportionment, incorporated herein by reference.

Under the uncleared boundaries, however, the 1992 elections provided minorities with a reasonable chance to elect a representative of choice. The reapportioned Commissioners Precinct No. 1, in 1992, provided for a precinct in which the combined minority percentage was 65.56%, and population imbalance was reduced to a relative deviation of 0.03% from the ideal. Attached hereto as Appendix E is a demographic assessment of the boundaries created by the objected to 1991 reapportionment, incorporated herein by reference.

Under the plan which was precleared by the Department of Justice on October 21, 1992, Commissioners Precinct No. 2, up for elections in 1994, will provide a combined minority percentage of 75.42%, with a relative deviation of 0.08% from the ideal. However, Commissioners Precinct No. 1, under the now precleared plan, provides a combined minority population of only 48.98%. It is extremely

unlikely that a minority candidate could be elected from the proposed Commissioners Precinct No. 1. Attached hereto as Appendix F is a demographic assessment of the boundaries created by the plan agreed to by the parties and precleared by the Department of Justice for use in 1994, incorporated herein by reference.

Therefore, if Appellant's relief were granted, the 1992 elections vacated, and new elections held under the agreed plan now precleared by the Department of Justice, the office of County Commissioner for Precinct 1 would be most likely filled by a candidate elected by the Anglo population of redrawn Precinct No. 1. The Three Judge District Court recognized this reality, and for that reason, among others, held that the most appropriate relief was to allow the use of the objected to plan for 1992 only, and to require the use of the proposed new reapportionment plan for 1994, since the election in that year would be most likely to elect a candidate of minority choice in any result. Under these facts, there can be no convincing argument made that the relief, if granted, would vindicate, establish or protect important voting rights. There is no showing of purposeful discrimination or other egregious conduct or harm which, under existing precedent,

would be required before a court would vacate or stay an election. U.S. v. Louisville Municipal, supra, Cook v. Luckett, supra. Appellant's case is based upon a much more technical violation of the voting rights act, and under a pragmatic analysis of the facts, one which would not vindicate, establish or protect rights that were not already address by the Appellees objected to plan. Such a marginal case should not be permitted to justify wholesale destruction of the elections conducted March 10, 1992 and November 3, 1992.

CONCLUSION

Based upon these pragmatic facts, and the law cited herein, the decision of the Three Judge District Court was appropriate. This Honorable Court should Affirm the judgment of the Court below, and Deny Appellant's Appeal.

ALLISON & ASSOCIATES
208 West 14th Street
Austin, Texas 78701
512/482-0701 Telephone
512/480-0902 Fax

(seal)

Office of the Secretary of State
John Hannah, Jr.
Secretary of State

MEMORANDUM

TO: Voter Registrars

FROM: Tom Harrison, Special Assistant for Elections

DATE: November 15, 1991

RE: Mass Mailout of Voter Registration Certificates

My office has received many calls regarding the mass mailout of voter registration certificates required by Section 14.001 of the Election Code. Since the redistricting plans for the State House of Representatives, the State Senate, the State Board of Education, and the U.S. Congressional seats have not been precleared, we have been asked if the mass mailout will be postponed.

The Secretary of State has no authority to delay the mailing of the certificates. The only legal way to delay the mailing would be to have a district judge enjoin you from mailing the certificates.

The Justice Department has agreed to respond to all state redistricting plans by November 22, 1991, so filing for office can begin on December 3, 1991. The Justice Department objected to the State House redistricting plans on November 12, 1991. The objection was based on lines drawn in El Paso,

Bexar, Cameron, and Dallas Counties. The State will offer a new House plan to the Federal Court in Washington.

Many of you are also waiting on preclearance for commissioners court precincts and justice of the peace precincts, as well as county election precincts. The Justice Department has made no commitments to the State regarding the dates for preclearance of these lines. They will probably take the 60 days allotted for preclearance.

I have attached a copy of a letter to Kathy Ferguson, Elections Administrator in Bexar County, which explains the Secretary's position on the mass mailout. Since the voting year begins on January, 1, 1992, and the return list is in effect for any election held on or after this date, it is important that you have this list available. Of course, the only way to have this list available is to mail the certificates in time to have them returned by the Post Office and complete the necessary computer work.

You must evaluate your own political situation and make the appropriate decision on when to mail your certificates and whether to use precinct lines that have not been precleared. Please call toll free 1-800-252-8683 if you have any questions.

(seal)

Office of the Secretary of State
John Hannah, Jr.
Secretary of State

October 18, 1991

Ms. Kathryn J. Ferguson
Bexar County Elections Administrator
203 West Nueva, Suite 301
San Antonio, Texas 78207-4515

Dear Ms. Ferguson:

This is in response to your letter dated October 5, 1991, which was faxed to our office. You asked how the current uncertainty concerning redistricting affects the mass mailout required by section 14.001 of the Texas Election Code.

Specifically, you asked whether the new certificates should be issued under the "old" lines or under the new, redistricted lines, and whether chapter 19 funds may be used to fund the mailout. The current uncertainty concerning redistricting is creating problems in many areas of elections. Unfortunately, the Election Code contains no provisions for extensions of time or alternate time schemes in the event a redistricting plan has not yet been precleared or is involved in litigation.

Presently, neither the senate, house, state

board of education or congressional plans have been precleared. Therefore, technically, these plans may not be implemented at this time. The most conservative answer is to conduct the mass mailout according to the old lines, since they are the only lines which are in effect. Once a redistricting plan becomes final, send notices of the changes in precincts to the affected voters. However, we realize the cost and double work this approach may create. Accordingly, our best advice to you is to conduct the mass mailout according to the new, proposed lines. If the redistricting plans are subsequently changed, you will need to send notification of the change to each affected voter. This second approach is likely to result in less cost and confusion to the county because the changes are likely to be fewer than the changes would be if the mass mailout were conducted pursuant to the old lines.

Of course, there is a certain amount of risk involved with taking this approach since it is not a procedure specifically authorized by the Election Code. However, considering the realities of the situation it appears to be the most practical course of action. We recommend, however, that you do not designate the senate, house, state board of education, or congressional districts on the new

cards since this may change and since this information is not required to appear on the card.

Concerning whether chapter 19 funds may be used to fund the mass mailout, the answer is clearly no. Tex. Elec. Code Ann. §19.004 (Vernon Supp. 1991). Chapter 19 Rules do not authorize "day to day" expenses of the voter registrar's office.

We hope you find this information helpful. If you have any questions or need additional information, please contact us.

Sincerely,

/s/ John Hannah, Jr.

John Hannah, Jr.

Secretary of State

(seal)

Office of the Secretary of State
John Hannah, Jr.
Secretary of State

MEMORANDUM

TO: County Clerks and Elections Administrators

FROM: Tom Harrison, Special Assistant for Elections

DATE: November 25, 1991

RE: Redistricting

The Justice Department has precleared the Congressional, Senatorial, and State Board of Education redistricting plans. The plans that have been precleared are referred to as plan numbers. They are as follows:

Congressional	Plan C657
State Board of Education	Plan E522
State Senate	Plan S560

The State Senate plan that was precleared is the court settlement in the Quiroz v. Richards lawsuit. The final judgment was granted on October 7, 1991.

The State House plan did not receive preclearance. The Justice Department stated they had problems with some of the districts drawn in the Valley and in Bexar, Dallas, and El Paso counties. A House committee is currently working on a new House plan. After all parties have agreed to the plan, it will be sent to a 3-judge panel in Washington for approval. I will let you know as soon as this plan has been precleared.

If the Commissioners Court drew precinct lines in accordance with the original Senate plan that passed the Legislature in May, it will be necessary for the Court to redraw election precincts so they do not violate Section 42.005 of the Election Code and obtain preclearance on the new precincts from the Justice Department.

I also want to remind you of the requirement in Section 42.035(d) that you send the Secretary of State a copy of the notice that was published in the newspaper concerning the new boundaries of county election precincts. A copy of this notice is to be filed not later than 20 days after it is published in the paper. If you failed to send it to our office within the time frame, be sure to put a copy in the mail as soon as possible.

Section 42.037 of the Election Code also requires you to file a county election precinct map

with our office not later than 120 days after the precincts have changed. You will need to file this map after the precincts have been precleared with the Justice Department.

If you have any other questions regarding redistricting, please feel free to contact my staff toll free 1-800-252-8683.

c: County Judges

ALLISON & ASSOCIATES

Attorneys at Law

Wahrenberger House

208 West 14th Street

Austin, Texas 78701

December 3, 1991

TO: COUNTY JUDGE AND VOTER REGISTRAR

FROM: ALLISON & ASSOCIATES

RE: DEADLINES UNDER ELECTION CODE

You should have recently received a letter from the Secretary of State regarding the obligation of your Voter Registrar to issue new voter registration certificates no later than December 6, 1991. (Art. 14.01, Texas Election Code, et seq.)

Additionally, the filing period deadline for individuals seeking office in the March Primary is January 2, 1992. (Article 172.023, Texas Election Code, et seq.)

Last night, the three judge panel in the U.S. District Court of Washington, D.C. refused to extend deadlines for the State of Texas elections and additionally refused to consider the revised House of Representative plan submitted by Attorney General Morales. This decision casts severe doubt upon the ability of the State to hold elections in

March. The resolution of this situation will not be known for some time. A portion of the requested relief was the extension of deadlines imposed by Texas law. The Court, in its opinion, refused to extend the deadlines at this time.

As result of the massive uncertainty that surround the political boundaries drawn by the Texas Legislature for the House of Representatives, the State Senate and the Texas Congressional delegation, all county redistricting plans are behind schedule, and as a result, candidates to not know under which lines to file, and likewise, the County Voter Registrar is unable to determine which lines apply to the required notification to voters.

At this time, political boundaries adopted by the Commissioners Court have not been precleared by the United States Department of Justice. Since the Voter Registrar must issue voter registration certificates no later than December 6, there is confusion and doubt as to which political boundaries should be used for the determination of election precincts by the Voter Registrar.

After careful consideration of the legal issues presented by this situation, we would outline the following options which are available:

1. DO NOTHING AT THIS TIME:

Until judicial opinions are rendered by the various state and federal courts having jurisdiction over several cases involving state redistricting and/or the Department of Justice preclearance, there is no way to project when elections will be held and what district lines will be utilized. For this reason, there is some support for no action until more clarity is available.

Unfortunately, two issues argue against this course of "non-action."

a. Failure to issue voter registration certificates would constitute a violation of State Election Code law, and constitute a potential basis for litigation against the County/Voter Registrar, including possible removal from office for purposeful disregard of requirements of office.

b. Practically speaking, we must assume until judicial orders to the contrary hold otherwise, that elections will be held on the second Tuesday in March. (Art. 41.007, Texas Election Code). The Voter Registrar must issue new voter registration certificates, obtain return of the non-forwardable postage, and purge voting lists in time for the March Primary. Even under the best of circumstances, if a March primary is held, the Voter Registrar should have no less than 60 days in which

to conduct voter notification, list purging, and issuance of final poll lists. This means that an extension of the notification deadline from December 6 should not extend beyond January 12, 1992 under any circumstances.

2. ISSUE CERTIFICATES UNDER EXISTING "OLD" LINES:

Existing political lines have been determined to no longer reflect numerical balance and/or minority representation standards required by the Constitution and laws of the United States. Although these lines are well known, and issuance of voter certificates under the old lines could be readily accomplished, there is every reason to believe that preclearance will be obtained within approximately 3 weeks time, thereby rendering the existing lines null and void, and requiring reissuance of voter certificates for the new lines. Not only will voters be confused by the receipt of two separate voter certificates, each possibly requiring the voter to cast his or her ballot in a different election precincts, but the duplication in effort and costs will be considerable.

We do not recommend that certificates be mailed under the old lines for the following reasons.

a. The existing lines are, without question, legally unsound. We have adopted a reapportionment plan which will alter these lines, although at this time we are unable to state when those changes will be precleared. Therefore, it does not seem prudent to issue notice under lines which we know are no longer legally valid.

b. The duplication of effort and costs to issue one set of certificates now, merely to comply with the election code requirement, and a second certificate when revised lines are precleared is deemed fiscally and administratively unwise.

c. Voter confusion will be compounded by duplicate certificates, thereby harming turnout and increasing confusion on election day.

3. ISSUE CERTIFICATES UNDER PROPOSED "NEW" LINES:

Although these lines have not been pre-cleared by the Department of Justice, we have every reason to believe that these lines will be approved. We therefore recommend that you issue voter certificates under the proposed lines for the following reasons:

a. Cost savings achieved by a single mailing will be considerable. In the event that the reapportionment plan is not pre-cleared in whole, we will in most cases be able to make relatively

minor changes to achieve compliance, thereby necessitating a limited second mailing to those voters affected by any requirement modification of the proposed lines.

b. Reduced confusion by the elimination of conflicting voter certificates.

c. We expect to obtain pre-clearance on the county reapportionment plan with two or three weeks. Therefore, the decision to issue certificates under the proposed plan is considered a "safe" procedure.

However, there are problems by this recommendation.

i. The proposed lines have not been precleared. Federal law preempts state law, and has the effect of causing any election held under such lines to be potentially subject to legal challenge. We firmly believe that the proposed lines will be pre-cleared eventually, and that the potential for legal challenge minimal, but you should be aware that if you elect to issue certificates under the proposed lines that you may be "implementing" a change in election policy, procedure or methods that has not been approved by the Department of Justice.

ii. We believe that issuance of voter certificates under the proposed lines is the best

option under very adverse circumstances. Should you elect to follow our recommendation, you would be entitled to assert a defense of reliance upon advice of legal counsel should you be legally challenged. A challenge might come from an interested party who believes that the proposed lines are discriminatory. Fortunately, in virtually every case, the old lines are more discriminatory than the proposed, so the ability of any interested party to show a discriminatory purpose or effect appears minimal.

Realistically, there is the potential of a legal challenge under any of the options, but we have attempted to suggest the most balanced course of recommended action taking all factors into consideration.

4. SEEK A JUDICIAL RESTRAINING ORDER DELAYING THE MAILING OF VOTER CERTIFICATES:

Should the Voter Registrar feel that he or she is simply unable to comply with the requirements of Article 14.001, Texas Election Code, a Temporary Restraining Order might be obtained from a local District Court judge.

A restraining order is good for 10 days, and may be extended in proper circumstances for additional time as the court deems appropriate.

However, for the reasons stated, until it is known when the state primary election will be held, we are unable to offer the court much guidance as to how long an extension will be necessary to accomplish the purpose of any delay. Therefore, we would have a difficult time obtaining any extension beyond the initial 10 days. While this might be sufficient in some cases, particularly if the situation involving state lines is clarified, in other cases 10 days might not be sufficient to obtain formal preclearance from Department of Justice for county boundary changes. Additionally, the logistical difficulty in obtaining a restraining order in all counties may be an impossible task at this late date.

5. FILING DEADLINES:

The County Chair for each political party, or the county judge for independent candidates, is the official authority empowered to receive applications for a place on the primary ballot. These officials are not, under state law, given any authority to accept multiple filings for the old versus new lines, and we do not believe that they can appropriately hold the application "unofficially" until a determination is made as to which lines prevail.

We are seeking a vehicle by which a statewide remedy might be had, but we are unable to assure you that such a remedy is available.

Most counties will receive preclearance before the expiration of the filing period on January 2, 1992. It is entirely possible that action by the state or federal courts now considering the redistricting cases will enter orders that will extend filing period and delay the March Primary. However, until these matters are resolved, any speculation on what might happen is just that, speculation.

Therefore, we suggest that if you have not been precleared by December 20, that a judicial order to extend the filing period be obtained in your own District Court. The procedure for such a temporary restraining order is similar to that described above in relation to the notification of voters.

CONCLUSION:

Please review these options and notify us as soon as possible of your decision. Should you determine that a Judicial Restraining Order is appropriate, we will need to discuss this issue with you since additional costs to the county will be incurred. These costs will include travel costs and additional legal fees since our contract does not provide for litigation expense.

Your earliest attention is appreciated. Please respond by FAX as soon as you determine what course of action is appropriate.

Sincerely,

/s/ Bob Bass
Bob Bass

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

RAFEL LOPEZ, Plaintiff	*	
vs.	*	
HALE COUNTY, TEXAS; BILL HOLLARS, County Judge, NINA JO MORRIS, HOMER ROBERSON, HENRY RIEFF and JAMES BELK, all in their official capacity as County Commissioners of HALE COUNTY, TEXAS, Defendants	*	CA No. 5-92-CV-0078-C Filed: July 17, 1992

STIPULATIONS

The parties have conferred and have agreed to the following stipulations:

1. That the Plaintiff, Rafel Lopez, is a Mexican American resident of Hale County, Texas. He has standing to bring this lawsuit.

2. That Hale County, Texas is a jurisdiction covered by Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973(c), and, therefore, cannot enforce voting changes unless they have been precleared by the United States Attorney General or the United States District Court for the District of Columbia.

3. That the Hale County, Texas reapportionment plan adopted by the Commissioners Court of Hale County, Texas on September 11, 1991, is a voting change requiring preclearance pursuant to the Voting Rights Act.

4. That the Department of Justice interposed an objection to the Hale County, Texas reapportionment plan on April 10, 1992.

5. That the March 10, 1992 primary election for Hale County, Texas, was an election conducted pursuant to an unprecleared election change.

6. Filed in the papers of this cause as "Agreed Interim Plan" is a new reapportionment plan that has been agreed to by the parties. The Agreement calls for the submission of the new reapportionment Plan to the United States Department of Justice for preclearance in accordance with federal law.

7. That the 1992 elections should not be set aside at this time.

Dated: July 15, 1992

Respectfully submitted,

Bob Bass
ALLISON & ASSOCIATES
The Wahrenberger House
208 West 14th Street
Austin, Texas 78701
512/482-0701
512/480-0902 Fax

/s/ Bob Bass
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/s/ Rolando L. Rios
Rolando L. Rios by Permission
Attorney for Plaintiff

(seal)

U. S. Department of Justice

Civil Rights Division
Voting Section
P. O. Box 66128
Washington, D.C. 20035-6128

October 21, 1992

Robert T. Bass, Esq.
Allison & Associates
208 West 14th Street
Austin, Texas 78701

Dear Mr. Bass:

This refers to the 1992 redistricting plan for the commissioners court in Hale County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on August 28, 1992.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement

of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,
John R. Dunne
Assistant Attorney General
Civil Rights Division
By: /s/ Steven H. Rosenbaum
Steven H. Rosenbaum
Chief, Voting Section

APPENDIX D

COUNTY: HALE

Plan: MALAPORTIONED PLAN IN USE BEFORE REAPPORTIONMENT IN 1991

Population 34671.00

	IDEAL POP.	ACTUAL POP.	ABSOLUTE DEVIATION	RELATIVE DEVIATION
1	8667	9358	690	7.96%
2	8667	7596	-1071	12.36%
3	8667	8206	- 461	5.33%
4	8667	9511	843	9.74%

MAX DEVIAION: 22.10%

DEMOGRAPHICS:

	HISP.	ANGLO	BLACK	OTHER
1	3879	5087	310	82
VAP	2208	3860	191	51
2	5052	1872	622	50
VAP	2899	1449	405	36
3	2827	5004	292	83
VAP	1595	3955	206	61
4	2670	6218	542	81
VAP	1490	4734	313	54

BY PERCENTAGE

	HISP.	ANGLO	BLACK	OTHER
1	41.45	54.36	3.31	0.87
VAP	34.99	61.17	3.03	0.80
2	66.51	26.64	8.19	0.66
VAP	60.53	30.26	8.46	0.75
3	34.45	60.98	3.56	1.01
VAP	27.42	67.99	3.54	1.06
4	28.07	65.38	5.70	0.85
VAP	22.61	71.83	4.75	0.72

COUNTY TOTALS:

HISPANIC	14428	41.61%
ANGLO	18181	52.44%
BLACK	1766	5.09%
OTHER	296	0.85%

APPENDIX E

COUNTY: HALE

Plan: PLAN USED FOR 1992 PRIMARIES,
OBJECTED TO BY DEPARTMENT OF JUSTICE

Population 34671.00

	IDEAL POP.	ACTUAL POP.	ABSOLUTE DEVIATION	RELATIVE DEVIATION
1	8667	8670	2	0.03%
2	8667	8690	22	0.26%
3	8667	8656	-11	0.14%
4	8667	8655	-12	0.15%

MAX DEVIAION: 0.41%

DEMOGRAPHICS:

	HISP.	ANGLO	BLACK	OTHER
1	4904	2986	730	50
VAP	2800	2181	461	28
2	5032	3100	499	59
VAP	2862	2433	331	44
3	2628	5703	213	112
VAP	1477	4504	152	79
4	1864	6392	324	75
VAP	1053	4880	171	51

BY PERCENTAGE

	HISP.	ANGLO	BLACK	OTHER
1	56.56	34.44	8.42	0.58
VAP	51.19	39.87	8.43	0.51
2	57.91	35.67	5.74	0.68
VAP	50.48	42.91	5.84	0.87
3	30.36	65.88	2.46	1.30
VAP	23.78	72.50	2.45	1.27
4	21.54	73.85	3.74	0.67
VAP	17.11	79.29	2.78	0.60

COUNTY TOTALS:

HISPANIC	14428	41.61%
ANGLO	18181	52.44%
BLACK	1766	5.09%
OTHER	296	0.85%

APPENDIX F

COUNTY: HALE

Plan: AGREED PLAN PRECLEARED BY DEPARTMENT OF JUSTICE FOR USE IN 1994 AND BEYOND

Population 34671.00

	IDEAL POP.	ACTUAL POP.	ABSOLUTE DEVIATION	RELATIVE DEVIATION
1	8667	8609	-58	0.68%
2	8667	8661	- 6	0.08%
3	8667	8656	-80	0.93%
4	8667	8655	145	1.68%

MAX DEVIAION: 2.61%

DEMOGRAPHICS:

	HISP.	ANGLO	BLACK	OTHER
1	3900	4392	247	70
VAP	2172	3304	159	40
2	5683	2129	800	49
VAP	3303	1660	524	37
3	2306	6016	189	76
VAP	1307	4724	132	56
4	2539	5643	530	101
VAP	1410	4309	300	69

BY PERCENTAGE

	HISP.	ANGLO	BLACK	OTHER
1	45.30	51.02	2.87	0.81
VAP	38.27	58.22	2.80	0.70
2	65.62	24.58	9.24	0.56
VAP	59.79	30.05	9.49	0.67
3	26.85	70.06	2.20	0.88
VAP	21.02	75.96	2.12	0.90
4	28.81	64.03	6.01	0.86
VAP	23.16	70.78	4.93	0.71

COUNTY TOTALS:

HISPANIC	14428	41.61%
ANGLO	18181	52.44%
BLACK	1766	5.09%
OTHER	296	0.85%